

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	
The Effect of Foreign Mobile Termination	)	
Rates on U.S. Customers	)	IB Docket No. 04-398
	)	
	)	

**REPLY COMMENTS OF COMPTel/ASCENT**

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## **EXECUTIVE SUMMARY**

The FCC should reject the "broad" market definition offered by some commenters. The call termination market is a separate market and the operators in that market have monopoly power. Mobile termination rates ("MTRs") should be limited to those associated with providing the service of termination and not include social costs, such as expansion of the retail mobile market. U.S. carriers and consumers should not be subsidizing this expansion. The amount of the subsidies is huge now and, in the absence of Commission action, will grow larger as mobile subscriptions continue to grow.

This web of affiliations between former incumbent fixed line operators and mobile operators exacerbates the anti-competitive nature of above-cost MTRs and make it less likely that foreign regulators will act to bring MTRs down to cost. The FCC has a statutory obligation to "ensure that U.S. consumers receive telecommunications services at reasonable rates" and it should exercise that authority as it did with above-cost international settlement rates. The FCC has sufficient information in the record upon which to act and should go on to issue a Notice of Proposed Rulemaking.

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**REPLY COMMENTS OF COMPTel/ASCENT**

CompTel/ASCENT submits these reply comments in response to the comments filed in the above-referenced proceeding. Many of the comments urge the Commission not to act, arguing that mobile termination rates ("MTRs") are not really above cost or do not disadvantage U.S. carriers or consumers; the Commission does not have the necessary authority to act or should depend on foreign regulators to bring MTRs down; or the Commission does not have the information needed to act. These comments address each of these arguments with the hope of demonstrating to the Commission that action against above-cost MTRs is a logical and necessary step in its long-standing concern with international settlement arrangements.<sup>1</sup>

**I. Mobile Call Termination is a Separate Market And Costs Should Be Limited to Those Associated with Termination**

A fundamental starting point for determining whether MTRs are above-cost and anti-competitive is defining the appropriate market. Comments filed in this proceeding present the

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<sup>1</sup> International Settlement Rates, *Report and Order*, FCC 97-280, 12 FCC Rcd 19806 ("*Benchmarks Order*") at ¶ 278. In the *Benchmarks Order*, the Commission referred to "more than sixty years of regulatory oversight of international settlement arrangements."

FCC with diametrically opposing market definitions. Those arguing against FCC action claim that "call termination is not a separate service but part of a bundle of services,"<sup>2</sup> Under this analysis, which effectively defines the market as one for retail mobile services, it might be proper to look at the costs of handsets, cell sites and monthly subscriptions, among other things, as part of the cost equation. In addition, it might be proper to speak about the competitive nature of the market, which so many of the commenters do.<sup>3</sup>

The FCC, however, should reject this "broad" market definition. It runs contrary to FCC decisions regarding domestic local access charges<sup>4</sup> and to the decisions of foreign regulators which have considered the question.<sup>5</sup> Cable & Wireless succinctly provides the reason why this broad market definition is unacceptable: it "does not stand up to scrutiny when the accepted methodologies for market definition, which focus on demand and supply side substitutability, are applied."<sup>6</sup>

Upon a finding that the market is call termination, the FCC should also conclude that each mobile carrier has market power for terminating calls on its network. Again, this position is supported by the Commission's local access charge proceedings.<sup>7</sup> As Cable & Wireless states, in a calling-party pays ("CPP") system, "mobile operators have market power over call

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<sup>2</sup> Comments of Vodafone, dated January 14, 2005 ("Vodafone Comments"), at 15. *See also*, Comments of BellSouth Corporation, dated January 14, 2005 ("BellSouth Comments"), at 5.

<sup>3</sup> *See, e.g.*, Comments of Telefonica, S.A., dated January 14, 2005 ("Telefonica Comments"), at 5; Comments of Telecom Italia, dated January 14, 2005 ("Telecom Italia Comments"), at 2.

<sup>4</sup> Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers, *Seventh Report and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 9923 (2001) ("*Access Charge Reform Order*").

<sup>5</sup> *See* Comments of CompTel/ASCENT, dated January 14, 2005 ("CompTel Comments"), at 3.

<sup>6</sup> Comments of Cable & Wireless, dated January 14, 2005 ("C&W Comments"), at 4.

<sup>7</sup> *Access Charge Reform Order* at ¶¶ 30-34.

termination."<sup>8</sup> This position is also supported by decisions of other regulators cited in CompTel/ASCENT's comments.<sup>9</sup>

Under the regulatory schemes of most countries with established regulatory regimes and as part of the obligations undertaken by many members of the World Trade Organization ("WTO") regarding market access for telecommunications services, interconnection rates must be "cost-oriented."<sup>10</sup> A WTO panel interpreted "cost-oriented" as used in the Reference Paper to mean pricing based on the costs incurred in supplying the service, in this case the interconnection service.<sup>11</sup> The panel specifically stated that costs associated with the general state of the telecom industry or the coverage and quality of the network CANNOT be included in calculating interconnection costs.<sup>12</sup> Thus MTRs cannot reflect, as BellSouth states, network cost plus social policy objectives, such as universal service.<sup>13</sup>

CompTel/ASCENT does not believe that the CPP system should be replaced or that the CPP system is inherently anti-competitive. Regardless of the benefit of the CPP systems, its structure allows for unchecked MTRs in the absence of effective regulatory action. This has resulted in a situation where U.S. consumers and U.S. carriers are subsidizing the development of the retail mobile phone market in other countries.

The level of MTRs mandated by regulatory action in South Korea, a country which has adopted the CPP system and has one of the highest levels of mobile penetration, is instructive. It

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<sup>8</sup> *Id.* at 3.

<sup>9</sup> CompTel Comments at 3.

<sup>10</sup> *See e.g.*, On access to, and interconnection of, electronic communications networks and associated facilities, EU Directive 2002/19/EC of 7 March 2002, at Art. 13(1); Bahrain Legislative Decree No. 48 of 2002 Promulgating the Telecommunications Law.

<sup>11</sup> Mexico - Measures Affecting Trade in Telecommunications Services, WT/DS/204/8 (June 9, 2004) ("U.S.-Mexico Panel Report") at ¶ 7.186.

<sup>12</sup> *Id.* at ¶ 7.183.

<sup>13</sup> BellSouth Comments at 12.

shows that where a regulator takes effective action, MTRs are significantly lower than elsewhere -- and the mobile market does not suffer. The following table shows the interconnection charges (exclusive of value-added taxes) paid per minute by the incumbent fixed operator, KT to cellular and PCS operators for fixed to mobile calls in 2001, 2002 and 2003 and the rates mandated by the Ministry of Information and Communication for 2004.<sup>14</sup>

Korean Won (US\$ )				
Carrier	2001	2002	2003	2004 (July 2004)
SK Telecom	63.6 (\$0.062)	45.7 (\$0.044)	41 (\$0.04)	31.81 (\$0.031)
KG Freetel	65.7 (\$0.064)	53.5 (\$0.052)	48.0 (\$0.046)	47.66 (\$0.046)
LG Telecom	65.7 (\$0.064)	59 (\$0.057)	52.9 (\$0.051)	58.55 (\$0.057)

## II. Above-cost MTRs Result in Harm to U.S. Consumers and Global Competition

The comments filed in this proceeding contain lots of irrelevant facts, designed to obscure the fundamental issue that above-cost MTRs result in harm to U.S. consumers and global competition. For example, one commenter noted that most of U.S. international traffic that terminates on mobile networks goes to Canada and countries with "low termination rates" so high MTRs affect only a small fraction of U.S. traffic.<sup>15</sup> Another noted that 95% of calls

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<sup>14</sup> KT Corp's Form 20-F filed with SEC for 2003 – pg. 32, available at <http://www.sec.gov/Archives/edgar/data/892450/000119312504109088/d20f.htm>; SK Telecom Form 8-K with the SEC on July 13, 2004, available at: <http://www.sec.gov/Archives/edgar/data/1015650/000114554904000922/0001145549-04-000922-index.htm>. The conversion to US dollars is based on the February 14, 2005 rate of US\$ 1 = 1,025.45 Korean Won.

<sup>15</sup> Comments of The GSM Association, January 14, 2005 ("GSM Association Comments") at 11.

terminating on mobile phones in Europe originate in Europe and that 23% of U.S. originated calls to mobile phones in Canada and Mexico so no FCC action is needed.<sup>16</sup>

These facts, however, do not diminish the subsidies that U.S. carriers are paying for mobile termination and the consequent harm to U.S. consumers and competition in the United States and globally. As demonstrated in the comments filed by AT&T, Sprint and MCI, even if only a "fraction" of U.S. traffic is affected, the amount of the subsidies is huge now<sup>17</sup> and, in the absence of Commission action, will grow larger as mobile subscriptions continue to grow.<sup>18</sup>

CompTel/ASCENT described the competitive harm of above-cost MTRs in its comments.<sup>19</sup> Information contained in filings by other commenters provide additional evidence that high MTRs distort the telecommunications market in the United States and globally. Sprint notes that payments to European carriers can help defray the costs of 3G spectrum, the costs of acquiring other mobile operators in Europe and elsewhere and the costs of investments in U.S. wireless carriers that compete with Sprint.<sup>20</sup> INTUG reiterates the use of above-cost MTRs to support 3G deployment.<sup>21</sup>

Further evidence is presented by AT&T. It points out that the beneficiaries of above-cost MTRs are former incumbent PTTs which "now recoup lost settlement revenues" through their

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<sup>16</sup> Vodafone Comments at 7.

<sup>17</sup> Sprint has estimated its outpayments at \$120 million annually (\$270 million when hubbed traffic is taken into account). Comments of Sprint, dated January 14, 2005 ("Sprint Comments"), at 5, 12; MCI has estimated that excessive MTRs cost U.S. consumers and carriers between \$317 and 408 million annually. Comments of MCI, dated January 14, 2005 ("MCI Comments"), at 5; AT&T cites out payments to France, Germany and the United Kingdom by all U.S. carriers of \$25 billion from 1998 to 2003. Comments of AT&T, dated January 14, 2005 ("AT&T Comments"), at 10.

<sup>18</sup> A number of commenters provide information on the rapid growth rate of mobile subscribers and the promise of continued growth. *See e.g.*, MCI Comments at 65; AT&T Comments at 6.

<sup>19</sup> CompTel Comments at 8.

<sup>20</sup> Sprint Comments at 6.

<sup>21</sup> Comments of INTUG, dated January 14, 2005 ("INTUG Comments"), at 5.



mobile affiliates.<sup>22</sup> Attachment A, which details the affiliations, is striking. It demonstrates the close relationship between the major fixed line players in most countries and the major mobile operators.

Furthermore, a number of these same former PTTs also own or are affiliated with mobile operators in many other countries. Telefonica, for example, owns the two major mobile operators in Peru, as well as mobile interests in Argentina, Chile, Colombia, Ecuador, Guatemala, Nicaragua, Panama, Venezuela and Uruguay.<sup>23</sup> Telecom Italia owns directly or indirectly majority interests in the major mobile operators in Brazil and Argentina, among others.<sup>24</sup> Orange, a subsidiary of France Telecom, has operations in nine EU member states, Romania and Switzerland.<sup>25</sup>

This web of affiliations make it possible for excess profits earned through above-cost MTRs in one country to be used to support market entry and operations in another country, including the United States. As pointed out by Sprint, "no accounting rules require mobile operators to earmark" MTRs to meet certain costs.<sup>26</sup> While there are rules against anti-competitive cross-subsidization in most developed regulatory regimes,<sup>27</sup> those rules would not necessarily prevent a company from taking "profits" from its affiliates to invest in other ventures. FCC action is needed to remedy these anti-competitive conditions.

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<sup>22</sup> AT&T Comments at 8.

<sup>23</sup> Comments of NII Holdings, Inc., dated January 14, 2005, at 4 and fn. 8. Telefonica does not mention its ownership interests in the comments which it filed in this proceeding.

<sup>24</sup> Telecom Italia Comments at 1. *See also*, "Telecom Italia Mobile, S.P.A. at [http://www.hoovers.com/tim/--ID\\_89502--/freeuk-co-factsheet.xhtml](http://www.hoovers.com/tim/--ID_89502--/freeuk-co-factsheet.xhtml).

<sup>25</sup> Comments of Orange SA, dated January 14, 2005, at fn. 2.

<sup>26</sup> Sprint Comments at 6.

<sup>27</sup> WTO members which have included the Reference Paper as part of their commitments in the telecommunications sector have an obligation to maintain measures to prevent anti-competitive cross-subsidization by major suppliers. Reference Paper, ¶ 1.2.

### III. The FCC has the Authority to Act and Should Exercise that Authority

The FCC should reject arguments that it has no authority to act against above-cost MTRs. Commenters have argued that neither the *Benchmarks Order* nor *C&W v. FCC*<sup>28</sup> is relevant to this proceeding for a number of reasons -- there is no privity of contract between U.S. carriers and mobile operators; the *Benchmarks Order* was designed to deal only with fixed-line compensation; MTRs do not subsidize foreign operations or government coffers; MTRs do not discriminate against U.S. callers but are the same for all users; the decisions related to monopoly markets and foreign government-owned carriers which is not the case now; foreign regulators are addressing the issue, etc.<sup>29</sup> These arguments are irrelevant or factually wrong.

There is nothing in the *Benchmarks Order* or *C&W v. FCC* that requires privity of contract in order for the FCC to regulate the conduct of U.S.-licensed carriers. While the court in *C&W v. FCC* did refer to "negotiations" between carriers and "negotiating settlement rates," the real focus of the decision was whether the FCC's action regulated U.S. licensees or foreign carriers. In that respect, the court looked at the measures as governing what U.S. licensees pay -- not what foreign carriers receive.<sup>30</sup> In any case, the distinction is irrelevant. The fact is that, even if there is no direct contractual relationship, mobile operators are imposing termination surcharges and U.S. carriers are paying those surcharges.<sup>31</sup>

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<sup>28</sup> *Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999) ("*C&W v. FCC*").

<sup>29</sup> Comments of CTIA - The Wireless Association, dated January 14, 2005, at 8-9; GSM Association Comments at 3-4.

<sup>30</sup> *C&W v. FCC*, 166 F.3d at 1229-30.

<sup>31</sup> U.S. carriers have tried to negotiate termination rates directly with mobile operators but without success. See Sprint comments at fn 17.

Other arguments are factually wrong. As demonstrated above, mobile operators are monopolists in the call termination market, in the same way that the foreign carriers referred to in the *Benchmarks Order* monopolized their termination market. Above-cost MTRs subsidize at a minimum retail mobile service in the same way that above-cost international settlement rates subsidized local domestic services. It is also the case that many carriers still have substantial government ownership, even if no longer 100%.

Similarly, it is wrong to distinguish the effect of MTRs from that of international settlement rates. Like above-cost MTRs, payments of above-cost international settlement rates at issue in the *Benchmarks Order* affected all international callers, not just U.S. callers. All international settlement rates were above cost at the time the Commission acted -- not just those on calls originating in the United States. As the Commission noted,

[a]ccounting rate reform will allow consumers in all countries to receive higher quality service, more service options, and lower rates as accounting rates are reduced to a more cost-based level.<sup>32</sup>

Finally, it is also incorrect to say that the *Benchmarks Order* only addressed fixed-line termination. As noted by Vodafone, U.S. carriers used to pay a single accounting rate, regardless of whether the call terminated on a fixed or mobile network.<sup>33</sup> It was this single rate, not fixed-line termination charges, that the Commission addressed in the *Benchmarks Order*. The fact that the market has developed so that international fixed-line termination and mobile termination are now priced separately does not mean that the pro-competitive principles enunciated in the *Benchmarks Order* are irrelevant.

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<sup>32</sup> *Benchmarks Order* at ¶ 7 (footnotes omitted).

<sup>33</sup> See Vodafone Comments at 3.

In fact, the *Order* is both relevant and supportive of Commission authority to act against above-cost MTRs. Faced with "artificially high prices for international services" and monopoly service providers, the Commission acted in the *Benchmarks Order* to "remedy anti-competitive conditions in the international marketplace."<sup>34</sup> It noted that its approach is fully consistent with our philosophy of using regulatory measures to control the pricing of interconnection by carriers with control over bottleneck facilities."<sup>35</sup>

MTRs are an outgrowth of the development of the telecommunications market since the *Benchmarks Order* which separated fixed line international termination rates from mobile rates. Like international settlement rates, MTRs are rates for interconnection charged by carrier with control over bottleneck facilities. Initiating a rulemaking and proposing rules to protect U.S. carriers and consumers is only an extension of the approach taken in the *Benchmarks Order*.

#### **IV. The FCC Should Not Wait for Foreign Regulators to Act**

The FCC is the appropriate forum for addressing the concerns raised in this proceeding. The FCC has a statutory obligation to "ensure that U.S. consumers receive telecommunications services at reasonable rates."<sup>36</sup> The Commission cannot ignore that obligation in the hopes that action by the International Telecommunication Union ("ITU") or foreign regulators will produce reasonable rates in any reasonable time period. The ITU examination of the question is subject to debate between now and 2008.<sup>37</sup> Certainly, the Commission cannot wait to act until then.

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<sup>34</sup> *Benchmarks Order* at ¶ 5.

<sup>35</sup> *Id.* at ¶ 3.

<sup>36</sup> *Id.* at ¶ 18.

<sup>37</sup> Comments of NTT DoCoMo, dated January 14, 2005, at 4.

Nor should the Commission depend on foreign regulators to do its job. Commenters argue that foreign regulators will act because their own fixed-line carriers and consumers have the same concerns as U.S. carriers and consumers.<sup>38</sup> This is not necessarily true.

Many foreign consumers enjoy the benefits of subsidized handsets and low monthly subscriptions. As pointed out above, many of the fixed-line carriers have mobile affiliates and reap the benefits of above-cost MTRs. Even those fixed-line carriers without mobile affiliates are benefiting either by adding "a substantial mark-up to the mobile termination rates in their charges" to retail customers and U.S. carriers and or declining "to pass on savings from reductions" in MTRs.<sup>39</sup>

Thus, the pressure of foreign regulators to impose cost-orientation on MTRs is not as great as commenters contend. In contrast, the pressure applied by foreign mobile carriers, and in some instances by the government itself, on their respective regulators not to intervene is great.<sup>40</sup> It is therefore important for the FCC to act instead of waiting for foreign regulators to fix the problem.

Some commenters have suggested that the FCC should not act because the World Trade Organization is "the proper forum" for resolving disputes regarding telecommunications services.<sup>41</sup> By joining the WTO, a member does not give up its national judicial or regulatory system and does not bind itself to seeking redress for all its problems at the WTO. Specifically, membership in the WTO does not preclude the FCC from exercising its statutory authority to regulate the U.S. market.

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<sup>38</sup> Vodafone comments at 9; C&W Comments at 9; Comments of Caribbean Association of National Telecommunications Organizations, dated January 14, 2005, at 3.

<sup>39</sup> INTUG Comments at 2.

<sup>40</sup> INTUG Comments at 5 and 10.

<sup>41</sup> Telefonica Comments at 2; Telecom Italia Comments.

## V. The FCC has Sufficient Information to Act

The FCC does not need detailed market data or a detailed cost model for every country with a CPP system in order to establish cost-oriented benchmarks. The *C&W v. FCC*, the court rejected petitioners' argument that the methodology chosen by the FCC to set international accounting rate benchmarks were improper because the FCC did not use data on the actual cost of foreign termination services.<sup>42</sup> The court also pointed out that the FCC had sought, but petitioners had withheld "the very cost data that would have enabled the Commission to establish precise, cost-based rates."<sup>43</sup> That is also the case to date in this proceeding, even though Commission rules on confidentiality would protect any cost data provided.<sup>44</sup>

MCI and AT&T have provided alternative methods for developing appropriate cost levels, which are sufficient for the Commission to propose draft rules.<sup>45</sup> The Commission would only be proposing rules at this stage of the proceeding. Mobile carriers and others will have time to provide the type of information that they failed to provide in the connection with the *Benchmarks Order*.

## VI. Conclusion

Contrary to many of the comments filed in this proceeding, mobile termination rates really are above cost. The rates force U.S. carriers and consumers to subsidize the build-out of the retail mobile phone market and create competitive distortions in the global telecommunications market in other countries. The Commission has the necessary authority and sufficient information to act and should not depend on foreign regulators to bring MTRs closer

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<sup>42</sup> *C&W v. FCC*, 166 F.3d at 1234-5.

<sup>43</sup> *Id.*

<sup>44</sup> See 47 C.F.R. 0.459.

<sup>45</sup> MCI Comments at 26-32; AT&T Comments at 42-49.

to cost. The Commission should proceed to the next step of issuing a Notice of Proposed Rulemaking.

Respectfully submitted,  
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